No. 34494-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

GLORIA MARIE MATHYER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR OKANOGAN COUNTY

APPELLANT'S REPLY BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

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A. ARGUMENT

1. Ms. Mathyer was denied her right to a fair trial by an impartial jury due to the court not replacing a biased juror.

The State mistakenly relies on *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995) for the proposition that the error claimed here was procedural under CrR 6.5 and not of constitutional magnitude. In *Gentry*, the trial court mistakenly seated an alternate juror as a regular juror. *Gentry*, 125 Wn.2d 614-616. This is distinguishable to the instant case because the juror at issue here expressed actual favorable bias towards one of the State's main witnesses. Instead, this court should analyze the constitutional protections of the right to be tried by an impartial jury as described in *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009) (Wa. Const. art. I § 22 focuses on the defendant's right to have unbiased jurors) and *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (partiality of a juror implicates the Due Process clause of U.S. Const. amend. XIV).

Accordingly, this issue may be raised for the first time on appeal.

2. Ms. Mathyer's right to counsel was violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.

Attorney-client privilege is certainly of constitutional magnitude as applied in this case because it involves the constitutionally protected attorney-client relationship. *State v. Perrow*, 156 Wn. App. 322, 335, 231

P.3d 853 (2010) (citing *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998)).

In the instant case, Mr. Newbery testified that he did not base his opinions on anything that Ms. Mathyer told him. RP 433. Therefore, there was no basis for the State to question Mr. Newbery about what Ms. Mathyer may have told him. There was no mental defense asserted at trial here. The impermissible questioning of Mr. Newbery about Ms. Mathyer's statements about being under the influence at the time of driving and consuming alcohol prior to the collision had no bearing on whether a ball joint was functional or not. This intrusion into the attorney-client privilege and violation of the work product doctrine violated Ms. Mathyer's Sixth Amendment right to counsel.

3. Ms. Mathyer's convictions were based on insufficient evidence.

A violation of RCW 46.61.502 may be proved in two different ways: either by showing the defendant's blood alcohol level was at least 0.08 within two hours after the incident (sometimes called "per se") or by other evidence, typically testimony, tending to show that the defendant was under the influence of alcohol and/or other drugs (sometimes called "other evidence"). *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004). Specific to Vehicular Assault and Vehicular Homicide,

each require proof that the defendant operated a motor vehicle "[w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502...". RCW 46.61.522(1)(b); RCW 46.61.520(1)(a). One means of proving intoxication involves showing that "the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." RCW 46.41.502(1)(a). In *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 673, 174 P.3d 43 (2007), the Washington Supreme Court indicated that to prove a violation under the *per se* prong of the statute, "the City was required to show that the defendant drove a vehicle and, within two hours, took a breath test showing a 0.08 alcohol level".

In the instant case, the evidentiary blood draw was done over six hours since Ms. Mathyer last drove a motor vehicle. RP 113-114, 241, 244. Therefore, the State could not and did not prove beyond a reasonable doubt that Ms. Mathyer's blood alcohol concentration was 0.08 or more *within two hours of driving*. It is impossible to determine whether the jury's general verdicts were based on a determination that Ms. Mathyer was "affected by" alcohol, or on a belief that her blood alcohol was greater than .08 *within two hours of driving*.

4. The court's instruction to the jury was improper by including the *per se* prong of the offenses when there was

not sufficient evidence to support it.

Appellant relies on its previous briefing for this section.

B. CONCLUSION

Given the foregoing, Ms. Mathyer respectfully requests this court to reverse her convictions and remand for a new trial.

DATED this 15th day of September, 2017.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Okanogan County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on September 15, 2017 to email addresses bplatter@co.okanogan.wa.us and sfield@co.okanogan.wa.us. Service was made by email pursuant to the Respondent's consent.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

GRECCO DOWNS, PLLC

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